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August 29, 2005

HAND DELIVERY

Mr. Charles L. A. Terreni
Chief Clerk/Administrator
South Carolina Public Service Commission
Synergy Business Park, The Saluda Building
101 Executive Center Drive
Columbia, South Carolina 29210

Re: Application of Time Warner Cable Information Services
(South Carolina), LLC d/b/a Time Warner Cable to amend
its Certificate of Public Convenience and Necessity to Provide
Interexchange and Local Voice Services in Service Areas
of Certain Incumbent Carriers who Currently have a Rural Exemption
Docket No. 2004-280-C

SO PUBLIC SERVICE COMMISSION
COLUMBIA, SC 29210
2005 AUG 29 AM 10:49
RECEIVED

Dear Mr. Terreni:

Enclosed for filing on behalf of Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, d/b/a Comporium Communications, Inc., Home Telephone Company, Inc., PBT Telecom, Inc. and St. Stephen Telephone Company, please find an original and ten (10) copies of a Return to Petition for Rehearing or Reconsideration. By copy of this letter and certificate of service, the parties of record are receiving (1) copy of this Return to Petition.

Please clock in a copy of this filing and return it with our courier.

Thank you for your assistance.

Very truly yours,

Margaret M. Fox
Margaret M. Fox

MMF/rwm
Enclosures

cc: Parties of Record

FILE COPY

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-280-C

Application of Time Warner Cable Information)
Services (South Carolina), LLC, d/b/a Time)
Warner Cable to amend its Certificate of Public)
Convenience and Necessity to Provide)
Interexchange and Local Voice Services in)
Service Areas of Certain Incumbent Carriers)
Who Currently Have a Rural Exemption)
_____)

**RETURN TO PETITION
FOR REHEARING OR
RECONSIDERATION**
(on behalf of RLECs)

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FILED
CLERK OF THE COMMISSION

Farmers Telephone Cooperative, Inc. ("Farmers"); Fort Mill Telephone Company, d/b/a Comporium Communications, Inc. ("Ft. Mill"); Home Telephone Company, Inc. ("Home"); PBT Telecom, Inc. ("PBT"); and St. Stephen Telephone Company ("St. Stephen") (collectively, the rural incumbent local exchange carriers or "RLECs") respectfully submit this Return to the Petition for Reconsideration of Order No. 2005-412, dated August 15, 2005, and filed by Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") in the above-referenced docket.

In its Petition, TWCIS asserts that the Public Service Commission of South Carolina ("Commission") erred in several respects. First, TWCIS contends that the Commission erred in finding there was a failure of proof regarding the original Application. See TWCIS Petition at p. 2, ¶ 3. TWCIS further asserts the Commission failed in finding there is a failure of proof because TWCIS failed to request a waiver of the RLECs' rural exemptions under 47 U.S.C. §

251(f)(1) in this proceeding, and further contends that the Commission erroneously held that TWCIS “should have sought to pierce the rural exemption in this certification proceeding.” TWCIS Petition at p. 3, ¶ 4; p. 4, ¶ 7.

The Commission’s finding that there is a failure of proof with respect to the original Application is clearly supported by the evidence of record. TWCIS’s Application described the service for which it requested certification as follows: “TWCIS plans to provide facilities-based local and long distance Internet protocol (“IP”) voice service, targeted to the residential market in [RLECs’] service areas” TWCIS Application at ¶ 9. When TWCIS filed testimony in support of its Application, its position changed. Although the original Application was not amended, TWCIS apparently in its testimony sought different authority. Ms. Patterson testified as follows:

Since the Vonage Order preempts the state from imposing certification and tariffing requirements, TWCIS intends to withdraw the retail service offerings in its current tariff once a new non-regulated entity is created to provide the retail voice services currently being offered by TWCIS. TWCIS intends to remain a certificated carrier and will obtain interconnection service from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity.

TR at 16 (Julie Y. Patterson pre-filed direct testimony at p. 5, ll. 18-23) (emphasis added).

At the hearing, TWCIS once again changed its description of the services for which it was seeking certification, by making vague references to seeking authority to provide “telecommunications services” as a “full-fledged CLEC.” See, e.g., TR at p. 119, ll. 10-12. TWCIS now argues that “the Commission ignored numerous instances in which Ms. Patterson testified that TWCIS seeks to amend its initial certification order to be a full-fledged CLEC in the service territories of the [RLECs].” TWCIS Petition at p. 3. This new alleged request to amend its initial certification, however, is not reflected in TWCIS’s Application or in Ms. Patterson’s pre-filed testimony in this proceeding. Nor is it clear from the vague references to

being a “full-fledged” or “fully regulated” CLEC exactly what services TWCIS seeks to provide. See, e.g., TR at 29, 35, 119. The Commission’s rules require that “Applications shall state clearly and concisely the authorization or permission sought” S. C. Code Ann. Regs. 103-834.A. Yet, it is no wonder the Commission stated: “Time Warner’s [TWCIS] position in this case is confusing, to say the least.” Order No. 2005-412 at p. 5. TWCIS never sought to amend its original Application except on a *de facto* basis through testimony, which itself was vague and unclear.

It is still not clear exactly what authority TWCIS is seeking here. However, viewing Ms. Patterson’s testimony along with the Application, there is substantial evidence in the record to support the Commission’s finding that TWCIS appears to be seeking only authority to enter into negotiations toward interconnection agreements with the RLECs. See Commission Order No. 2005-412 at p. 5. Specifically, it appears that TWCIS is interested in receiving certification as a telecommunications carrier so that it can obtain network interconnection and other services from incumbent local exchange carriers like the RLECs. TWCIS would then provide those functionalities to its soon-to-be-created non-regulated entity, which would provide the IP local telephone service to end users. See, e.g., TR at 8-9 (“One reason we want to be certified is . . . we want to be able to negotiate Interconnection Agreements”); TR at 16 (“TWCIS intends to remain a certificated carrier and will obtain interconnection services from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity”); TR at 38 (“At this point, we seek to obtain interconnection agreements and provide wholesale services to ourselves and to others and to tariff a wholesale offering”); TR at 56 (“We seek to provide a variety of non Internet protocol format telecommunications services in order to provide retail VoIP services and other services throughout the state of South Carolina”) (emphasis added); TR

at 56-57 (“[R]eally what we’re looking to do here is to be able to step in and provide all of those transport and other telecommunications services that you show on the board that are provided [to TWCIS] today by MCI”); TR at 70 (“We need certification in order to obtain interconnection rights”); TR at 128 (“What we seek through this proceeding is the ability on our own, as full-fledged telecommunications carriers to obtain interconnection agreements on our own”). As Mr. Staurulakis testified:

[I]t is not clear to me what TWCIS is seeking from the Commission. On the one hand, TWCIS indicates that it will voluntarily comply with all applicable rules of the Commission, at least until such time as all appeals associated with the Vonage proceeding have been decided. On the other hand, TWCIS intends to move its retail VoIP services to a non-regulated entity where I presume these services will no longer be bound by Commission rules and regulations. It would appear that TWCIS wants to have its cake and eat it too. By agreeing to voluntarily comply with Commission rules and regulations, TWCIS hopes to receive its expanded authority as a telecommunications provider. Having such authority will allow it to seek interconnection with the Rural LECs and request local number portability (“LNP”). Once it obtains interconnection and LNP, TWCIS will then offer a wholesale VoIP service to the newly created non-regulated entity that will then sell VoIP service to retail customers, without having to worry about complying with any Commission rules or regulations.

TR at 139.

Even if TWCIS’s attempt to expand upon its Application by making statements from the witness stand were proper (which it is not), TWCIS still has not met the required standards for certification. TWCIS must demonstrate, among other things, that provision of its service will not adversely impact the public interest. S.C. Code Ann. § 58-9-280(B)(5). When Ms. Patterson was asked in her pre-filed testimony whether the issuance of an amended certificate to TWCIS would be in the public interest, her response focused on TWCIS’s provision of competitive facilities-based local telephone service to residential end users in the RLECs’ service areas. See TR at 21 (Patterson pre-filed direct testimony at p. 10, ll. 8-23); TR at 26 (Patterson pre-filed rebuttal testimony at p. 4, ll. 6-16). In other words, TWCIS takes the position that it does not

need certification for its IP service, but it wants certification for “other” purposes, and such certification is in the public interest because it will allow TWCIS to provide the IP service (for which it does not need certification). Such circular logic was properly rejected by the Commission, and the Commission correctly found that there was a lack of proof with respect to the original Application.

Furthermore, the Commission’s finding that it could not waive the rural exemptions in this proceeding because they are not at issue here is factually correct and does not prejudice TWCIS in any way. TWCIS has acknowledged that it is not seeking to terminate rural exemptions in this proceeding. See TR at 18 (Patterson pre-filed testimony at p. 7, ll. 15-23). TWCIS’s assertion that the Commission held that TWCIS “should have” sought to terminate rural exemptions in this case is not reflected in the language of the Commission’s order. The Commission merely noted that the rural exemptions were not at issue and made it clear that its order should not be read to waive or terminate those exemptions. See Order No. 2005-412 at p. 5 (“Since, as amended at the hearing, the rural exemptions of the RLECs are not at issue in this case, we cannot waive those exemptions.”); Order No. 2005-412 at p. 6 (“Obviously, this Order should not be construed as a ruling on the waiver of the rural exemptions in this case, since this issue was not before the Commission.”). This appears to be an undisputed point. Id., see also TR at 18 (Patterson pre-filed direct testimony at p. 7, ll. 15-23).

TWCIS further asserts the Commission’s order violates Section 253(a) of the Telecommunications Act of 1996 because it allows the RLECs to “effectively prohibit competition within their service areas until such time as they choose to interconnect with CLECs.” See TWCIS Petition at p. 3, ¶ 6.

The Commission's order does not constitute a barrier to entry within the purview of Section 253(a) of the Act. TWCIS argues that the Commission somehow is denying TWCIS the right to provide competitive service within the RLECs' service areas. See TWCIS Petition at p. 3. Yet TWCIS itself has told the Commission it does not need certification to provide the competitive service it seeks to provide within the RLECs' service areas. See TR at 16 (Patterson pre-filed direct testimony at p. 5, ll. 18-19). TWCIS filed an application seeking certification for its residential facilities-based local IP service offering. At the hearing, it stated that it did not need certification for that service, but would like to have a certificate for "other" services to which it made only vague references. The Commission properly denied TWCIS certification with respect to the Application it filed because, as the Commission clearly found, there was a failure of proof with respect to the original Application, as discussed above.

The Commission's action does not constitute a barrier to entry. If TWCIS's IP service is indeed a "telecommunications service" (which, at the very least, is an unsettled question),¹ then TWCIS would be a "telecommunications carrier" and would be entitled to seek interconnection under Section 251 of the Act. See 47 U.S.C. § 153(44) (defining "telecommunications carrier" as a provider of "telecommunications service"); 47 U.S.C. § 251(a)(1) (telecommunications carriers have an obligation to interconnect with the facilities and equipment of other telecommunications carriers); 47 U.S.C. § 251(c)(2) (incumbent local exchange carriers have an obligation, in the absence of a rural exemption, to provide interconnection for the facilities and equipment of a requesting telecommunications carrier"). Assuming TWCIS is a telecommunications carrier (which, again, is an unsettled question under federal law), then there

¹ See Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004), ("Vonage Order"), fn 46 ("We do not determine the statutory classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future.")

is no barrier to entry because, as the Commission stated, TWCIS does not need the Commission's approval to proceed under Section 251. See Order No. 2005-412 at 5. If, on the other hand, TWCIS is not a telecommunications carrier because it is not providing a telecommunications service in this instance, then Section 253 of the Act does not even apply. See 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.") (emphasis added).

This is yet another example illustrating that TWCIS is trying to play both sides of the fence. It argues it should be considered a telecommunications carrier for purposes of seeking interconnection and services from the RLECs, while maintaining that the end user service it seeks to provide within the RLECs' respective service areas is not a telecommunications service and should not be regulated as such.

TWCIS also contends that the Commission's ruling that TWCIS has the ability to negotiate interconnection agreements without being certificated violates state law and is erroneous as a practical matter. See TWCIS Petition at p. 5, paras. 8 and 9.

This is not true. As noted above, TWCIS either has the right to request interconnection under § 251 of the federal Act or it does not, depending on whether the services TWCIS seeks to provide are telecommunications services or not, which is an unsettled question under federal law. The Commission can't change that and, as the Commission correctly found, TWCIS does not need the Commission's approval to request interconnection under Section 251 of the federal Act. See Order No. 2005-412 at 5. The statute cited by TWCIS, S.C. Code Ann. § 58-9-280(C)(1), specifically states that its provisions "shall be consistent with applicable federal law." Thus if, as

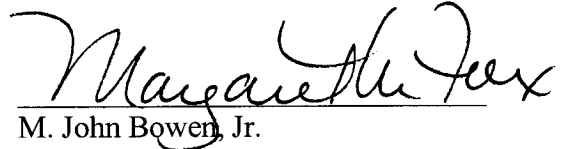
TWCIS suggests, it is entitled under Section 251 to obtain interconnection in order to provide a service for which it asserts it does not need state certification, then Section 251 would govern.

Finally, TWCIS contends that the Commission's decision is arbitrary and capricious because TWCIS met the statutory certification requirements. See TWCIS Petition at p. 6, ¶¶ 10-11. As discussed above, however, TWCIS's Application was not sufficient and the authority sought by TWCIS was, at best, vague and unclear. Furthermore, as discussed above, TWCIS failed to meet the public interest requirement, because it relied on services for which it was admittedly not seeking certification (*i.e.*, facilities-based IP local telephone service to residential subscribers in the RLECs' service areas) in making its public interest showing.

Moreover, TWCIS's assertion that it need not demonstrate a need in order to be granted a "certificate of public convenience and necessity" is perplexing. See TWCIS Petition at p. 1 ("lack of immediate need for a certificate is not a valid ground for withholding one.") TWCIS's apparent belief that it is only required to show that it has the technical, managerial, and financial ability to provide services in South Carolina in order to receive a certificate essentially ignores half of the certification statute, and would allow carriers to receive a certificate even when they do not state with specificity the services for which they request certification. This position is contrary to state law, ignores the statutory role and duties of the Commission, and should be rejected.

WHEREFORE, for the reasons stated above, the RLECs respectfully request that the Commission deny the Petition for Rehearing or Reconsideration of Order No. 2005-412 filed by TWCIS, and grant such other relief as is just and proper.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Margaret M. Fox". The signature is written in black ink and is positioned above a horizontal line.

M. John Bowen, Jr.
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PBT Telecom, Inc., and St. Stephen
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August 29, 2005

Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF
SOUTH CAROLINA

Docket No. 2004-280-C

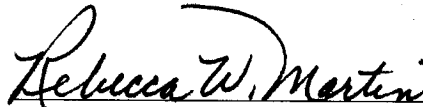
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_____)

**CERTIFICATE
OF SERVICE**

This is to certify that I, Rebecca W. Martin, an employee with the McNair Law Firm, P. A., have this date served one (1) copy of a Return to Petition for Rehearing or Reconsideration on behalf of Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company d/b/a Comporium Communications, Home Telephone Company, Inc., PBT Telecom, Inc., and St. Stephen Telephone Company in the above-referenced matter to the person named below by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below.

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August 29, 2005

Columbia, SC